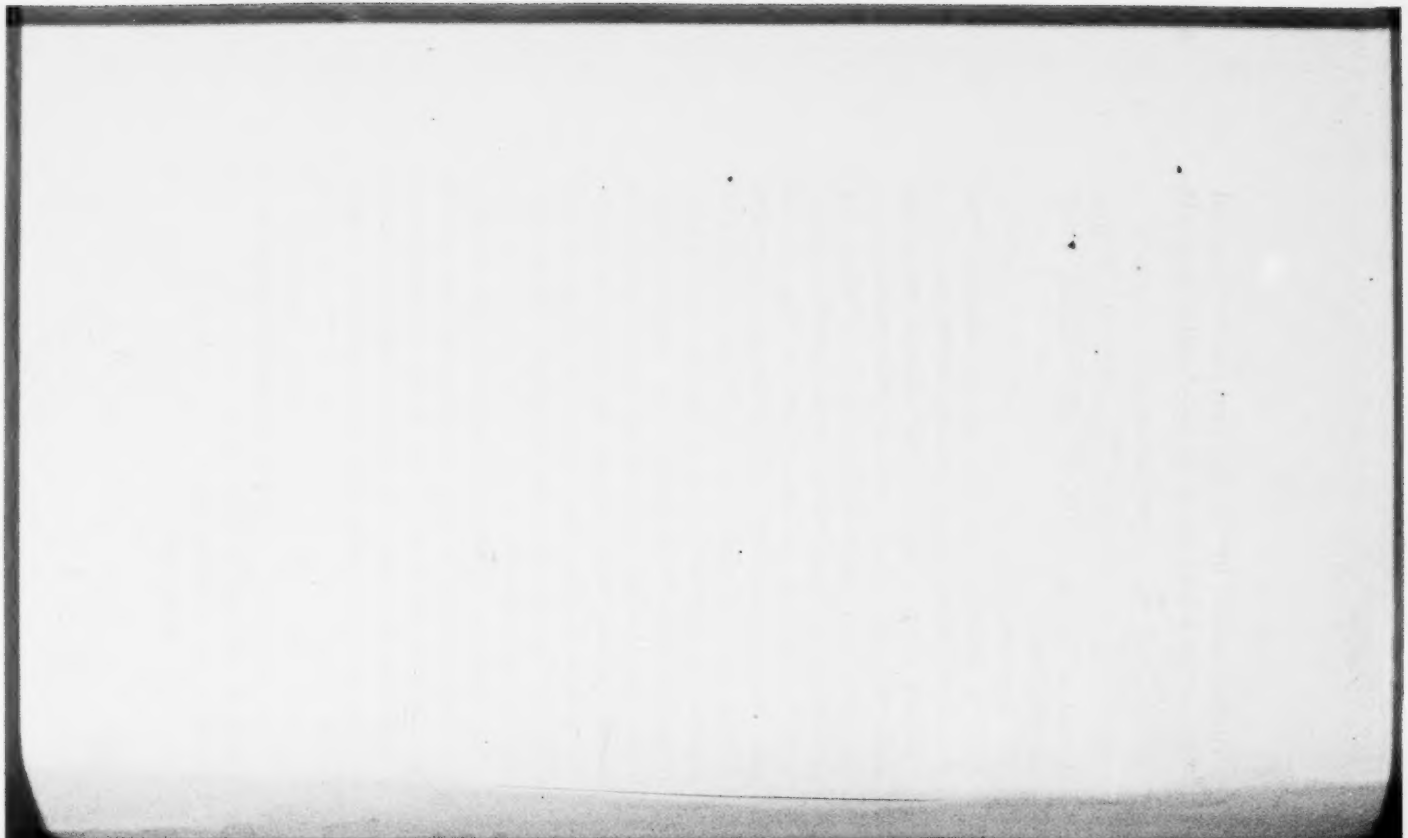

No. 106, 107
Reply Brief
Filed Oct. 31, 1898.

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

Nos. 106, 107 and 108.

THE TERRITORY OF NEW MEXICO, Appellant,

vs.

UNITED STATES TRUST COMPANY OF NEW YORK, ET AL.

REPLY BRIEF OF APPELLANT.

F. W. CLANCY,
Counsel for Appellant.

In the Supreme Court of the United States.

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THE TERRITORY OF NEW MEXICO, APPELLANT,

vs.

UNITED STATES TRUST COMPANY OF NEW YORK ET AL.

REPLY BRIEF OF APPELLANT.

Appellees in their brief make nine "Points" which are as follows:

> "*First Point.* From the terms of the act approved July 27th, 1866, read in the light of the history of the times when it was passed, it is clear that Congress intended to prohibit each one of the Territories through which it might pass, from interfering by way of taxation with the railroad it was seeking to have built."
>
> "*Second Point.* It must be presumed that Congress knew the rule of the common law that fixtures attached to the freehold become a part thereof, and intended that this rule should apply to fixtures to be placed by the railroad company upon its right of way, so that such fixtures would become as completely a part of the right of way as the soil, the rocks and the trees composing the same at the time of the grant thereof."
>
> "*Third Point.* Congress intended that the right of way of the Atlantic and Pacific Company which

was provided for in the act under consideration, should be an estate in fee simple."

"*Fourth Point.* The grant of exemption from taxation of the 'right of way' contained in the second section of the act, exempted all improvements that Congress intended should be placed upon such right of way for the purpose of building and operating the railroad contemplated by the act."

"*Fifth Point.* If the question of the scope of this exemption be at all doubtful, the practical construction placed upon it by the Territory and its officers charged with the execution of the revenue laws, ought to receive great weight, if it be not controlling so as far as this Territory is concerned."

"*Sixth Point.* There is no provision in the laws of the Territory of New Mexico authorizing the segregation of the superstructure from the right of way of any railroad for purposes of assessment or taxation, and, therefore, the assessments in question were void."

"*Seventh Point.* The burden is upon the Territory to make it clearly appear that it has the right to assess for the purpose of taxation a part of an estate which Congress has declared exempt in such Territory from taxation either by Congress or the Territory."

Eighth Point. This is not formulated like the others so that it can be quoted. Its purpose appears to be to set out the absurdity of an opinion of the Supreme Court of Arizona; an erroneous statement that that Arizona case and one in Maine are the entire authority of appellant for its proposition that the superstructure is not a part of the "right of way" for purposes of taxation; and to reiterate the assertion that a Territory has no power to tax any portion of this railroad, and therefore appellant's brief is not applicable to the case.

"*Final Point.* The levies of taxes sought to be recovered by the intervening petitions in the three cases now before this court are illegal and void, re-

gardless of any question of exemption or of any statutory authority of the Territory of New Mexico."

There are some things under each of these points which require some reply; but before proceeding to consider them in detail, attention must be called to the fact that counsel for appellees devote a great amount of space to showing that the property sought to be taxed is "real estate," as though the proposition were disputed by appellant; and, indeed, on pages 29, 32 and 55 of their brief they quite distinctly intimate that appellant's claim is that the property is personal, and has been assessed as such. At no stage of these proceedings, from their initiation in the District Court in New Mexico to the the present time, has the Territory claimed this property to be personal property, but has always asserted it to be "real estate," and taxable as such, under the statute from which quotation is made on page 10 of the original brief herein; and that, under that statute, it was, for purposes of taxation, separable from the soil to which it is attached. It was not necessary for appellees to struggle so hard to prove the "real estate" character of this property when appellant asserted the same thing.

Attention is also called to the fact that running through nearly all of the argument in the brief for appellees, and underlying and permeating the reasoning therein, is the idea of the inferior character of a territorial government and of the little weight to be given to territorial legislation, although there is no direct attempt to answer the argument in the original brief for appellant, at pages 16 to 23, which shows conclusively that territorial legislatures possess all the power of Congress itself when legislating for the territories, subject only to the express limitations imposed by Congress itself. It must be assumed that counsel for appellees could find no answer to this proposition.

We will now proceed to consider in detail so much of the brief for appellees as calls for special reply.

Appellees' First Point.

There is but little under this heading which requires notice. Counsel give some interesting historical information about the country at the time the railroad company was created, all with a view to inducing the court to hold that an exemption of the "right of way" means an exemption of the whole railroad and telegraph line, because Congress surely intended to be very liberal and generous. They declare that the Union-Central Pacific lines received—

> "actually larger land grants than were given by Congress to any of the other railroads afterwards created by it."

It is submitted that this is a mistake, but in discussing it, it is not admitted that it is proper or material for consideration in ascertaining the meaning of "right of way."

By reference to "The Public Domain" at pages 270 and 271, it will be found that the lands patented to the Union Pacific, with those estimated as necessary to complete the grant, amount to 11,097,082.49 acres, and the lands of the Central Pacific reach 7,638,589.75 acres, or a total for the two of 18,730,672.24 acres; while the lands of the Atlantic and Pacific are 23,176,536.50 acres, or nearly five million acres more than the Union-Central Pacific line.

Moreover, this road was notoriously less expensive to construct than the others, and was so known to be in 1866.

It is urged that Congress would not have given anything so worthless as the exemption of the mere right of way from taxation and therefore intended more. As this court said in the cases of *Railroad Co.* vs. *Dennis, 116 U. S. 665*, and *Railroad Co.* vs. *Thomas, 132 U. S. 184*, this argument—

> "rests too much on inference and conjecture to afford a safe ground of decision where the words of the statute creating the exemption are plain, definite and unambiguous."

But it is not true that the strip of land covered by the right of way is so utterly worthless, or was reasonably so to be considered when the exemption was granted. Wherever a town would grow up or agricultural land be brought under cultivation, this despised strip of land, over 24 acres to the mile, would be of great value. As an instance, attention is called to the land occupied for railroad purposes by the Atchison, Topeka and Santa Fe and Atlantic and Pacific Railroads in the present city of Albuquerque. That land, if valued at anything like the values of adjoining land of individual owners, must be considered as worth hundreds of thousands of dollars. Similar conditions undoubtedly exist in many other places.

Railroad Co. vs. *Baldwin, 103 U. S. 430.*

Appellees' Second Point.

It is cheerfully admitted that Congress knew the common law rule that fixtures attached to the freehold become part thereof; but it is denied that it intended, or ever dreamed of, any such application of that rule to fixtures to be placed by the railroad company upon its road, as would make them a part of the easement which it granted. As counsel state this point, they assume that "the soil, the rocks and the trees" compose the "right of way." This goes far toward assuming what they evidently consider the vital part of their case.

They insist that "right of way" means the same things as roadbed, track, bridges, etc., etc., but they are unfortunate in their quotation and authorities cited to sustain this position. On page 22 they quote from *Elliott on Railroads*, but that writer in that quotation plainly shows that he considers "right of way" as something other than roadbed, tracks, etc.

On page 24, of their brief, counsel for appellees quote from the case of *Joy* vs. *St. Louis, 138 U. S. 1*, to show that

a track is a part of the right of way. The question upon which the court was passing in the portion of the opinion from which this quotation is made, was as to whether a contract for the use of a right of way included use of tracks when existing tracks occupied the whole of the land covered by the right of way; and the court, including what is quoted in appellees' brief, spoke as follows:

> "The evidence shows that the entire right of way is occupied with tracks and sidings, so that there is no room for another and independent track, and that the entrance into the Union depot over the tracks of the Wabash Company, is the only practical route for the road of the Colorado Company, to that depot. As the Kansas City Company had the right to cover its right of way with main and side tracks so that there should be no room on such right of way for the tracks of any other railroad, it would be in its power to defeat the intent of the agreement if the right of way should be held not to include the tracks. Moreover, as the County company and the Kansas City company were tenants in common of the right of way through the park and to the east end of the cut, each company had the right to use the whole of the right of way, subject to the right by the other company to use the whole of it. Hence, the grant to other roads of the privilege of using the right of way applied to the whole of such right of way through the park, and not to a particular part of it. The track can not be separated from the right of way, the right of way being the principal thing, and the track merely an incident. A right of way is of no practical use to a railroad without a superstructure and rails. The track is a necessary incident to the enjoyment of the right of way."
>
> *Joy* vs. *St. Louis, 138 U. S.*

This has no application to anything in dispute in the present case. It does not tend to show that when Congress speaks of a "right of way" it was intended to include the

improvements which might at any time be placed on the land covered by the right of way.

On pages 24 and 25 of appellees' brief, appears a quotation from an opinion of Mr. Justice Brewer, bearing upon what is meant, and covered, by the term "right of way." It does not tend strongly to support appellees' position; and a little further along in the same opinion, in discussing the applicability of a statute of limitations, the learned judge uses language which shows how little foundation there is for that position, and expresses views with regard to the character of the interest which a railroad company has in the land over which it claims a right of way, which are the views of every lawyer unbiased by the exigencies of some particular case, as follows:

> "But it is urged that the statute only applies where the legal title is taken to land—where the fee is claimed; and that it does not apply to the case of an easement—a right of way. Well, your statute at the time these condemnation proceedings were had, authorized the appropriation of the fee or the use. I think it must be conceded, however, that, unless the proceedings affirmatively show that the fee is sought to be taken, nothing is taken but that which is needed, and that is the use. The record of those proceedings is not entirely clear, but I think the fair construction to put upon it is that the railroad was seeking to take no more than needed, and that was the easement—the use.
>
> *Keener* vs. *U. P. R.R., 31 Fed., 128.*

Clearly, that court was not of the opinion that the right of way of a railroad company is "an estate in fee simple."

On page 25 of their brief, counsel for appellees quote from the opinion in *Railroad Co.* vs. *United States, 93 U. S. 442.* In that quotation it is said that:

> "The forms of legislative expression thus adopted and coming down from a period when they had

> greater practical significance than they now have, bring with them an established sense which renders them free from all uncertainty and doubt."

That is just what appellant claims about "right of way." It had "an established sense" which renders it "free from all uncertainty and doubt." What lawyer in 1866 ever imagined that "right of way" included roadbed, tracks, telegraph lines, station houses, etc.,—everything that might be fastened to the ground for the corporate purposes of a railroad company? The popular use of the phrase, as synonymous with land, has certainly grown up since that time.

On pages 26–7 of their brief, counsel for appellees refer to the case of *Milhau* vs. *Sharp*, *27 N. Y., 620*, in which the court held void an ordinance giving a right to build a street railroad on Broadway, but the reason for such holding is not clearly or accurately stated in appellees' brief. They say it was—

> "because of the fact that upon building the road it would become permanently attached to and a part of the fee which the city authorities would thereby surrender the right to use for a public street."

This seems to indicate some confusion of ideas, because, so far as I can discover, the court did not so hold, but really declared the ordinance void because the city had no authority to grant such a franchise (*pp. 619–20*), and intimates that the fee of the street was not vested in the city (*p. 623*); and, in summing up the reasons for holding the ordinance void, the court says:

> "The resolution is, therefore, void, for the reasons that it purports to create a franchise which the common council had no power to create; to vest in the defendants an exclusive interest in the street which the common council had no power to convey; and to divest the corporation of the exclusive control of

> the street which has been given to it as a trust for the use of the public, and which it is not authorized to relinquish." (*P. 622.*)

On page 27 of their brief, counsel for appellees refer to the case of *People ex rel.* vs. *Cassity, 46 N. Y. 46,* and say that—

> "the court held that the taxing officers had a right to tax the real estate upon which the superstructure was laid, and that necessarily the superstructure was included in such taxation as real estate."

This is erroneous. The court did not so hold, as will appear by reference to the opinion, all of the material portion of which will be found on pages 11–12 of appellant's original brief in this case.

At pages 28–9 of their brief, counsel for appellees cite five cases to sustain the proposition that the term "right of way," applied to railroads, has a very broad and inclusive meaning—so broad as to include large tracts of land covered with tracks, shops, depots, stock-yards, etc. These cases are so cited upon a material proposition as to require some notice. They are:

C. & A. R. Co. vs. *Dennison, 98 Ill., 350.*
Pfaff vs. *Railroad Co., 108 Ind., 144.*
Railroad Co. vs. *Cass County, 76 N. W., 239.*
State vs. *Railroad Co., 35 N. J. L., 537.*
Railroad Co. vs. *Venango County, 38 Atl., 1088.*

In the Illinois case the court held that the right of way included thirty-two acres of land covered with tracks and other railway property, because the statutory definition of a railroad right of way required it. That statute is quoted by the court at page 356, and is as follows:

> "Sec. 42. Such right of way, including the superstructures, with main, side or second track and turnouts, and the station and improvements of the

> railroad company on such right of way, shall be held to be real estate for the purposes of taxation, and denominated 'railroad track,' and shall be so listed and valued; and shall be described in the assessment thereof, as a strip of land extending on each side of such railroad track and embracing the same together with the stations and improvements thereon."

What has a decision, under such a statute, to do with the meaning of the term "right of way" in the present case?

In the Indiana case, the decision is the same as in the Illinois case, under a statute almost exactly the same, and so declared to be by the court at page 151, where it is said to be the same as the Illinois statute in every material feature.

The North Dakota case, reported in *76 N. W.*, was one in which the question decided was as to the construction of language in the constitution which declared that certain property of railroad companies should be assessed by the state board of equalization; and the court gave the word "roadway" a very broad meaning so as to include everything used in connection with the actual operation of the road. The very question involved in the present case, as to whether improvements can be assessed separate from land, was argued, but the court refused to pass upon it, as being unnecessary to its decision of the case, but there is nothing about "right of way."

In the New Jersey case the controversy was as to taxing land and a branch road leading to it, the land having been purchased by the company for the gravel which was on it, to be used in ballasting the road, the statute of the state having provided a percentage method of taxation of the railroad company, and declared "that no other or further tax or imposition shall be levied or imposed upon said company," (*p. 538.*) There was some dispute as to whether the

gravel-pits and branch road were necessary or merely convenient; and the court held that they approximated to pure necessity, (*p. 547*) but said that necessary meant what was "suitable and proper to accomplish the end that the legislature had in view." There was no attempt to broaden the ordinary meaning of right of way, nor was any such question involved.

The Pennsylvania case, reported in *38 Atlantic*, merely decides the point that a shop for repairs in the business of the railroad company was a necessary part of the equipment of the railroad, and therefore not taxable by local authority, such property being taxable by the state, although a shop for the construction of locomotives and cars would be taxable by local authorities, as had been previously decided in other cases.

It may well be asked, what have any of these cases to do with the proposition which they are cited to support?

Appellees' Third Point.

This is the most important point to appellees' case, although they declare that they regard it as "a matter of very little importance."

They assert that Congress intended that the right of way "should be an estate in fee simple." (*Page 32 of their brief.*)

As to the case of *Railway Co.* vs. *Roberts, 152 U. S. 114*, upon which appellees so greatly rely, and the only one in which a word can be found even *seeming* to support their contention, in addition to what is said in appellant's original brief, at page 8, attention is called to the fact that an examination of the opinion of the Supreme Court of Kansas in the same case, clearly shows that the question involved was as to the right of possession only, and that the case stood in the state courts exactly as actions of ejectment stand almost everywhere, as one brought to recover possession of the land, although, of course, a claim of title might incidentally arise in determining the right of possession. All

that was necessary, however, to the decision of the case was, as Judge Ross holds, in effect to pass upon the question as to whether the railroad company had a right to the exclusive possession of the land without regard to the grade of its title.

R. W. Co. vs. *Roberts, 43 Kan., 103 et seq.*

On page 34 of appellees' brief, quotation is made from the syllabus of a California case to show that the grant of a right of way to a railroad company is not the grant of "a mere easement." The statement in that syllabus that the act of Congress "did not grant a mere easement for the construction and operation of its road," does not appear in the opinion of the court. All that was decided was that the act made "a special grant of a right of way two hundred feet in width on each side of the road," and that the company was entitled to the exclusive possession of the land so described, and could therefore maintain an action of ejectment to recover that possession.

R.R. Co. vs. *Burr, 86 Cal., 279.*

In support of their contention that by the definite location of the line of the Atlantic and Pacific Railroad, an estate in fee in the land included in the "right of way" vested in the company, appellees cite, at page 36 of their brief, the case of *R.R. Co.* vs. *Alling*, in which this court, through Mr. Justice Harlan, speaking of what was intended by Congress in granting a right of way to a railroad through the public domain, declares, as any lawyer naturally would—

> "that the intention of Congress was to grant to the company a present beneficial easement in the particular way over which the designated routes lay, capable, however, of enjoyment only when the way granted was actually located, and in good faith appropriated for the purposes contemplated by the charter of the company and the act of Congress."

R.R. Co. vs. *Alling, 99 U. S., 475.*

In this case the court held that the Denver and Rio Grande Railway Company had a prior right to a right of way through the Grand Cañon of the Arkansas, subject to the right of another company to use the same right of way, and even the same track in narrow places where two tracks would be impracticable. This latter right was in consequence of a later act of Congress, and the court refused to pass upon the question as unnecessary, as to—

> "whether Congress might legally have subjected the Denver Company, without its consent, to the provisions of the Act of March 3, 1877, had that company actually located and constructed its road in or through the Grand Cañon within five years after the passage of the Act of June 8, 1872."
>
> *Same case, p. 480.*

This would indicate that it was at least a debatable proposition as to whether the grant of such a right of way by Congress to a railroad was absolute, as claimed in the present case, because if the grant were of that nature, there could be no pretense of later control by Congress; and it also shows that "right of way" does not include track.

The other cases cited on page 36 of appellees' brief do not tend to support their position or to assist in the elucidation of the questions involved.

In this connection attention must again be called to the case, already cited, of

Keener vs. Railroad Co., 31 Fed. 128.

This court in considering the effect of deeds conveying land as a right of way to a railroad company for the purpose of establishing a railroad thereon, said:

> "The right granted was merely a right of way for a railroad. It was granted to an existing corporation which had a franchise. The grant to the 'assigns' of the corporation cannot be construed as extending to any assigns except one who should be the assignee

of its franchise to establish and run a railroad. Nor did the mention of rights, members and appurtenances belonging and appertaining to the strip of land, or the use of the words 'forever in fee simple' enlarge what was otherwise the limited character of the grant. No fee in the land was conveyed, nor any estate which was capable of being sold on execution on a judgment at law, or separate from the franchise to make and own and run a railroad. The corporation could not have made a voluntary conveyance of the right of way, severed from its franchise. What it acquired is merely an easement on the land, to enable it to discharge its function of making and maintaining a public highway, the fee of the soil remaining in the grantor. By the terms of the charter of the Lafayette Branch Company, it was given the power to purchase, hold, lease, sell and convey real, personal and mixed property, so far as it should be necessary for the purposes mentioned in the act, namely, to construct and operate the specific railroad authorized therein, with power to 'lay and collect toll from all persons, property, merchandise or other commodities transported thereon.' By the terms of its charter, therefore, in connection with the terms of the deeds of the right of way, that right was indissolubly linked to the franchise, and to the purpose of the existence of the corporation, and to its public functions, so long as they shall exist. It would violate not only the expressed intentions of the grantors in the deeds, but the manifest purpose of the legislature of Alabama, to permit a private person to seize and appropriate the right of way by the purchase of anything at a judicial sale apart from the franchise on which the right of way was dependent. The sheriff's deed purported to convey in words, 'the said tract of land or railroad-bed, to wit: the right of the Opelika and Oxford Railroad, so far as the right of way has been obtained, from Lafayette to the edge of Lee County, and all the appurtenances belonging to said road from Lafayette to the line of Lee County.' If the deed undertook to convey any land or soil or road-bed, it conveyed with it the right of way. The

> deed, in reciting the levy, states that it was made 'on the following tract or lot of land as the property of the said railroad company, to wit: the right of way,' etc., and states that that was what was sold. It was not lawful for the purchasers to have a deed of the right of way, and if they obtained a deed of anything, the right of way was included, or else they received nothing beyond, perhaps, a right to carry away from the land what the company had put upon it."
>
> *East Alabama R. Co. vs. Doe, 114 U. S., 350–1.*

The words of conveyance in the deeds under consideration in the above case were certainly stronger and better calculated to convey an estate in fee than those to be found in the second section of the act of Congress of 1866.

Appellees' Fourth Point.

This is to the effect that the exemption of the "right of way" exempted all improvements which Congress intended should be placed thereon. In other words, as shown by the whole brief, appellees contend that "right of way" is the same thing as, or includes, in the words of the assessment in case No. 106, "the improvements, cross-ties, rails, fish-bar plates, bolts, bridges, culverts and structures together with the telegraph line" of the company, and all "station houses, shops, depots, switches, water tanks and improvements" at the different towns on the line. This is not in harmony with the unvarying rule of this court as to strictness of construction of exemptions from taxation, but the appellees have assured the court that this rule does not apply to them.

The authorities cited by appellees in support of this point are all cases where state courts have shown some liberality in the construction of exemptions from taxation, holding that general words of description of exempt property include all the particular things which can possibly belong to the general description. It is doubtful, to say

the least, whether this court would ever go as far as some of these cases, but none of them hold that a narrow, particular term of well-known, limited, time-honored significance, such as "right of way," can, by construction, be so expanded as to include everything connected with the land over which the right of way may be exercised.

On page 41 of their Brief, by dovetailing a contention of counsel with the language of the court, counsel make it appear that the supreme court of Massachusetts, in *Inhabitants of Worcester* vs. *Railroad Co., 4 Met., 564*, decided that "right of way" included the structures on the land; but an examination of the opinion will show that the court decided nothing of the sort.

The opinion of the learned Chief Justice of the supreme court of New Mexico, which is highly commended in appellees' Brief, reads very beautifully, and if mere form were sufficient, would be very convincing. He says that Congress tendered the inducements it deemed sufficient to secure the construction of the railroad—

> "not the right of way over the land, but the right for a railway; not the right to the soil only, but the right to the roadbed; not the right to the roadbed only, but to a roadbed equipped with ties and rails, to constitute a railway over which cars could be conducted for the lawful purposes of the government; not only the right to a roadbed so furnished, but to a railroad provided with the fixtures essential to the fulfillment by the corporation of the purposes for which it was created." (*Record in No. 106, p. 72.*)

From all this he draws the conclusion that Congress also intended to exempt from taxation all the inducements which it tendered. But why stop where he does? Of what use would the railroad be at the point at which he leaves it? Until equipped with a thousand locomotives and ten thousand railroad cars it would be of but little practical value. Why not add all the rolling stock and every other appli-

ance necessary or convenient to the full, complete and profitable operation of the railroad to the other things which it is assumed Congress intended to offer, and by the same sort of illogical reasoning reach the conclusion that, when the right of way was exempted from taxation, that exemption must extend to all these other things which Congress ought to have had in contemplation?

The learned counsel for appellees are clearly opening the way for this claim of exemption, and, if they can lead this court to the point of declaring as they contend, that the railroad and telegraph line are only parts of the right of way, which is exempt, they can confidently go before the local tribunals of Arizona and New Mexico, and there contend that the railroad being exempt from taxation, this exemption must extend to everything used in the operation of the road, whether rolling stock, hotels, warehouses or anything else however remotely connected with the business of the company, and will rely upon such authorities as are cited on pages 37 to 42 of their brief in this case, which show that some state courts have thus held with reference to such exemptions.

Appellees' Fifth Point.

This needs but little attention. Appellees urge that the neglect of the territorial officers to assess this property for a number of years is a practical construction of the statute which estops their successors. This sort of argument was made to this court in the cases of *R.R. Co.* vs. *Dennis, 116 U. S.*, and *R.R. Co.* vs. *Thomas, 132 U. S.*, in the first of which there had been an omission by the state officers to assess for twenty-five years, but the court held that this fact could not—

> "control the duty imposed by law upon their successors, or the power of the legislature or the legal construction of the statute under which the exemption is claimed."

Moreover, if such an argument were sustained, we would have the incongruous and ludicrous result that in one of the territories this property would go untaxed because its officers were negligent; while in another, Arizona, it would be taxable because there the officers had been earlier aware of their duty.

A. & P. R.R. Co. vs. *Lesueur, 19 Pac., 157.*
A. & P. R.R. Co. vs. *Yavapai County, 21 Pac., 768.*

As to the case of *Northern Pacific Co.* vs. *Carland, 5 Mont., 146*, it must be admitted that the court of Montana did say that the exemption of the right of way extended to such property as is sought to be taxed in the present cases; but it is equally true, as pointed out by the supreme court of Arizona in the case above cited, that this part of the Montana opinion is *obiter dictum*, entirely unnecessary to the decision of the case. It is to be noted that even the Montana court declared the right of way to be an easement.

Appellee's Sixth Point.

Here the position is taken by appellees that there is no statute of New Mexico which authorizes the assessment of the superstructure for taxation separate from the right of way.

Sections 2807 and 2834 of the Compiled Laws of 1884, which are quoted on pages 45 and 46 of appellees' brief, certainly contain the authority which appellees deny. In section 2807 it is declared that "real estate" includes "improvements," and that "improvements" includes—

> "all buildings, structures, fixtures and fences erected upon or affixed to land, *whether title has been acquired to said land or not.*"

Section 2834 requires the assessor to make out an assessment book, "with appropriate headlines," which must contain among other things "the several species of property and the value as hereinbefore indicated." Certainly "im-

provements" is one of the said "several species of property," and the assessment books in New Mexico, ever since the enactment of the statute in 1880, have always been made to show "Value of Land" and "Value of Improvements" separately. The form will be found in the Record in case No. 106, between pages 42 and 43.

There is no reasonable doubt of the meaning of the statute, but, if there were, this would be a proper matter to which to apply the doctrine of practical construction of a statute by the officers entrusted with duties under that statute, and the authorities cited by appellees under their "Fifth Point" would be appropriate.

Moreover, statutes of this kind are entitled to a most liberal construction for the purpose of preventing the escape from taxation of any property which ought to bear its share of the expenses of government. Authorities need not be cited in support of this well-established rule.

On page 47 of their brief, counsel for appellees seek to deprive the case of *San Francisco* vs. *McGinn, 67 Cal., 110*, of all weight by pointing out that the constitution of California, which went into effect in 1879, requires that "lands and the improvements thereon shall be separately assessed." It is impossible to see how this provision can affect the value of the decision in the case cited, if it had any bearing upon it; but an examination of the opinion will show that it was not based on that constitutional provision and could not properly have been so, as the lease under consideration had been made in 1875, four years before the constitution of 1879 went into effect. This case is fully quoted from in appellant's original brief at pages 12–13.

In addition to the cases heretofore cited by appellant, on this point, attention must be called to some New York decisions under a statute similar to the New Mexican statute. The New York statute reads as follows:

> "Sec. 2. The term 'land' as used in this chapter, shall be construed to include the land itself above

and under water; all buildings and other articles and structures, substructures and superstructures erected upon, under or above, or affixed to the same; all wharves and piers, including the value of the right to collect wharfage, cranage or dockage thereon; all bridges; all telegraph lines, wires, poles and appurtenances; all surface, underground or elevated railroads; all railroad structures, substructures and and superstructures, tracks and the iron therein; branches, switches, and other fixtures permitted or authorized to be made, laid or placed in, upon, above or under any public or private road, street, or grounds; all mains, pipes and tanks laid or placed in, upon, above or under any public or private street or place; all trees and underwood growing upon land; and all mines, minerals, quarries and fossils in and under the same except mines belonging to the state. The term 'real estate' and 'real property' wherever they occur in this chapter shall be construed as having the same meaning as the term 'land' thus defined."

2 Rev. Stat. N. Y. 7th Ed., p. 981.

With the above quoted statute in force, a case was decided in the court of appeals in which it appeared that the relators rented land from the Brooklyn Benevolent Society and erected buildings thereon. The real and personal property of the society was by statute exempt from all taxation whatsoever, except for local improvements, so long as the revenues should be disposed of according to the directions of the charter. It was held that the exemption did not extend to the buildings, but they must be assessed as the property of the relators, although the land to which they were affixed was exempt from taxation; and it was argued by counsel, as in the present case, that they had become a part of the realty, and were consequently exempt from taxation.

People ex rel. vs. Assessors, 93 N. Y., 310–313.

It is to be noted that there was nothing in the statute,

any more than in the New Mexican statute, in terms authorizing the assessment of improvements separate from the realty to which they are attached; but the judges of the court, disregarding precisely the same argument now urged here by counsel for appellees, found no difficulty in holding that they could and should be so assessed.

In another New York case, decided under the same statute, the plaintiff sought to have assessments of taxes declared void on the ground that they were a cloud on his title. It appears that he was the owner of a wharf erected on certain land which had been granted by the city in 1852 for the purpose, and was then under water, which wharf was to be a public wharf, but as to which the grantees had a perpetual right to collect wharfage, etc. The court said that, under the statute above quoted, upon the assumption that the fee to the land under water, upon which the pier was constructed, was reserved to, and remains in, the city, yet the pier was real estate for the purpose of taxation. Referring to the statute, the court said:

> "Under the definition of land thus given, one may be taxed as owner of the fee of land, and another for the trees, buildings and other structures thereon, and the mineral and quarries therein."
>
> *Smith* vs. *The Mayor, 68 N. Y., 554.*

It is somewhat difficult to understand why counsel for appellees, on page 47 of their brief, cite two decisions of this court, reported in *118 U. S.* and *127 U. S.* In the first one, on the point of the invalidity of an assessment, the court said:

> "The case, as presented to the court below, was, therefore, one in which the plaintiff sought judgment for an entire tax arising upon an assessment of different kinds of property as a unit—such assessment including property not legally assessable by the state board, and the part of the tax assessed against the latter property not being separable from

> the other part. Upon such an issue, the law, we think, is for the defendant; an assessment of that kind is invalid and will not support an action for the recovery of the entire tax so levied."
>
> *Santa Clara* vs. *Railroad Co., 118 U. S., 394.*

The other case is to the same effect; but what has this to do with the case under discussion? There was no such assessment as in California; but, on the contrary, appellees complain that we have been too specific and definite in our assessments.

Appellees' Seventh Point.

Here is an attempt by appellees to reverse and overturn the whole doctrine of this court on the subject of exemptions from taxation. Instead of requiring the claimant to show beyond a doubt that he is entitled to such exemption, the taxing power must assume the burden of making it clearly appear that it has the right to assess the property which seeks to escape its due share of the burden of taxation.

In this proposition is involved the assumption, hereinbefore referred to as running through the whole of appellees' argument, that there is something so inferior about a Territory that a different rule is to be applied to a controversy between it and this railroad from what would be proper if the controversy were with the national government. There is no foundation for this assumption and nothing can be found in the brief of appellees to justify it.

As to this, appellant again refers to what appears in its original brief at pages 16 to 23, to which no answer has been made.

On page 50 of their brief counsel for appellees cite ten cases, the array of which looks quite formidable, but, upon close examination, they do not seem to have much bearing on the present case, nor to support the "Seventh Point" under which they appear.

The first case cited is one in which this court held that a legislative act declaring that certain lands which should be purchased for the Indians should not thereafter be subject to any tax, constituted a contract which could not be rescinded by a subsequent legislative act, such repealing act being void under that clause of the Constitution of the United States which prohibits a state from passing any law impairing the obligation of contracts.

New Jersey vs. *Wilson, 7 Cranch, 164.*

Appellees cite another case in which this court decides that a general banking law enacted by the State of Ohio in 1845, which required officers of banks to make semi-annual dividends, and the payment of six per cent. of such dividends for the use of the State which should be in lieu of all taxes to which the bank would otherwise be subject, made a contract fixing the amount of the tax, and could not be changed by a subsequent legislature.

Bank vs. *Knoop, 16 How., 369.*

Appellees cite, also, two other cases which decide precisely the same point under the same statute.

Dodge vs. *Woolsey, 18 How. 331.*
Jefferson Bank vs. *Skelly, 1 Black., 436.*

Appellees cite also a case in which this court decides that a State authorizing a municipal corporation to issue bonds and to exercise the power of local taxation in order to pay them, constituted a contract within the meaning of the Constitution, and that the authority can not be withdrawn until the contract is satisfied.

Von Hoffman vs. *Quincy, 4 Wall., 535.*

They cite also a case in which it is held that an exemption of the property of a corporation from taxation becomes

a contract after the corporation is organized, and its obligation can not be impaired by subsequent State legislation.

Home of the Friendless vs. *Rouse, 8 Wall., 430.*

They cite also a case in which this court holds that a charter of incorporation granted by a State creates a contract which the State can not violate; and that the exemption from taxation by such a charter of the property of a railroad company covers its franchise and rolling stock, the franchise being property as much as anything else.

Railroad Co. vs. *Reid, 13 Wall., 264.*

They cite another case which declares the same rule as to the nature of such a legislative contract with a corporation, but an earlier general statute, subjecting all charters to amendment, alteration or repeal, was held applicable and really a part of the contract, so that the State legislature had power to change the charter.

Tomlinson vs. *Jessup, 15 Wall., 458–9.*

They cite also two cases from Ohio which hold that where the State by the act incorporating the Ohio University gave that institution land and authorized perpetual leases of the land, the leased lands to be forever exempt from taxes, the acceptance of leases constituted a binding contract between the State and the lessees which can not be impaired by subsequent legislation attempting to tax the lands.

Matheny vs. *Golden, 5 Ohio St., 361.*
Kumler vs. *Traber, 5 Ohio St., 442.*

Appellees' Eighth Point.

Appellees admit that there is one case opposed to their contention, but their comments upon it indicate that they have given it but little attention, probably because they

consider it of little importance. They say, on page 51, that, in that case, the court finds—

> "that the 'right of way' is an interest in realty, and that the superstructure placed upon it became part of this 'right of way,' and then proceeds to hold that the exemption from taxation of the 'right of way' did not exempt the superstructure, because of the fact, so far as one can determine, that there was no express exemption in the act, of the superstructure as such."

A more inaccurate statement of the effect of the admirable opinion referred to can hardly be imagined. It is correct only so far as it states that the court holds that the right of way is an interest in realty. It does not hold that the superstructure became part of the right of way. If it did, of course there could be but one conclusion, and that in favor of the railroad company. The attention of the court is most earnestly invited to this opinion, as being clear, well reasoned and convincing on every material point now in controversy. Appellees urge that the opinion is unworthy of respect because it holds that the Territory has power to tax the franchise of the company. The only reason suggested against such power is that this court has held that a State can not tax the franchise of a corporation which is a national agency, although it may tax its property, but appellees here ignore the argument as to the character and power of the territorial governments upon which appellants rely, and to which no answer has been, or can be, made. Congress could tax such franchise, and it has delegated its taxing power to the Territory without any limitation as to franchises. In New Mexico no attempt has been made to tax the franchise.

Counsel for appellees further state, on page 51 of their brief that this Arizona case and one from *60 Me.*, constitute the entire authority of appellant for its proposition that the superstructure is not a part of the "right of way." This

is an error. Appellant has cited, in its original brief, the cases of—

People vs. *Casity, 46 N. Y. 48–50.*
People vs. *Commissioners, 82 N. Y. 462–3.*
San Francisco vs. *McGinn, 67 Cal. 110.*
People vs. *Shearer, 30 Cal. 656.*
Crocker vs. *Donovan, 30 Pac. 377.*
Turney vs. *Saunders, 4 Scam. 527.*
Gold Hill vs. *Caledonia Co. 5 Sawy. 575.*
A. & P. R. Co. vs. *Lesueur, 19 Pac 159.*
Portland R. R. Co. vs. *Saco, 60 Me. 196.*

Upon this point, appellant has cited in the present brief, the cases of—

Smith vs. *The Mayor, 68 N. Y. 554.*
People vs *Assessors, 93 N. Y. 310–313.*

It is insisted that these cases are all pertinent, strongly persuasive, and entitled to great weight in the consideration of this question.

A statement is made on page 54 of appellees' brief, that in the assessments in Valencia County penalties of one-fourth of the assessed value have been added. This is a mistake, as will appear by reference to the assessments themselves at pages 80 to 84 of the printed Record in case No. 169. The records do not disclose any disposition to oppress or unfairly to treat the railroad company. No complaint has been, or can be, made as to the valuation of its property. The assertion of the claims of the Territory in these proceedings was made necessary by the foreclosure suit, as a matter of fairness and justice to any one who might purchase the property under the decree of the court.

Appellees' Final Point.

The proposition here is that the clause as to exemption from taxation, contained in the second section of the act of Congress of 1866, about which this whole controversy has

heretofore been carried on, is of minor importance, or rather of no importance, because the Territory cannot tax the railroad at all for the reason that the government, by virtue of the provisions of the eleventh section of the act, has such a proprietary interest in the property as to exempt it entirely from taxation. This is no more startling than the discovery by appellees of the all-inclusive meaning of the innocent-appearing common law phrase, "right of way."

But little need be said about this. There is no attempt to tax the interest of the government, whatever it may be, nor to proceed in any way so as to diminish the value of that interest; and the reasoning of this court, in the opinion from which quotation is made, at pages 57 and 58 of appellee's brief, strongly supports the right and power to tax the visible property of the railroad company.

Enforcement of the Tax.

Counsel for appellees repeatedly express great apprehension as to the disastrous effect of sustaining the taxing power of the Territory, because, as they assume, the only possible way of enforcing the payment of the tax is by a sale of a section of the railroad, which would in effect destroy it. They refer to the doctrine that "the power to tax involves the power to destroy," and seem apprehensive that this destruction will be brought about in the manner above indicated in compelling payment of taxes. This is not the "power to destroy" included in the power to tax; but a moment's reflection, and a brief examination of the law, will show how little ground there is for the fears of appellees.

The section of the New Mexican statutes as to taxes being liens is as follows:

> "Every tax levied according to the provisions of this act shall have the force and effect of a judgment against the person assessed, and taxes upon real estate are hereby made a lien thereon from the

> date of the levy thereof; and taxes due from any person upon personal property shall not be satisfied, nor the lien removed, until the taxes are abated or paid, or the property sold for the payment thereof. The tax list and warrants hereinbefore provided for shall have the force and effect of an execution against the person or property assessed."
>
> *Compiled Laws of New Mexico, 1884, Sec. 2849.*

The tax list being, in effect, an execution against the property assessed, we are led to consider what may be sold under an execution against a railroad company. The law is so well summarized in a recent work on railroads that it will suffice here to quote it:

> "The franchise of a railroad company and corporate property essential to the enjoyment of the franchise are not subject to sale upon execution unless the legislature authorizes or assents to the transfer. But locomotives, cars and other personal property held by the corporation, if not in actual use in the operation of the road, are held by some authorities to be subject to sale on execution, and there seems to be no reason why the property of a railroad corporation not essential to the enjoyment of its franchise, should not be subject to the payment of its debts."
>
> *2 Elliott on Railroads, Sec. 520 and cases cited,* especially *Gue* vs. *Canal Co., 24 How. 262–3.*

Whatever differences in the decisions of other courts there may be upon this question, as to what may be levied upon under an execution against such corporations, so far as this court is concerned there is no departure from the rule laid down in *24 Howard, 262*, above cited, which is certainly a proper rule, and one which will prevent any such dreadful consequences to this corporation as are conjured up by the too lively imagination of counsel for appellees.

No reason can be assigned for permitting this tax list execution to go beyond the scope of any other execution,

and appellees might just as well protest against the propriety of permitting judgments in ordinary actions against the railroad company. The courts will not permit the dismemberment of the railroad, nor will the Territory be compelled to resort to such mutilation to collect its debts.

East Alabama R. Co. vs. *Doe, 114 U. S. 350.*

It is respectfully submitted that the defenses set up by appellees are not well founded in law; that no sufficient answer has been made to the case of appellant; that the contentions of appellees amount only to a desperate effort to confuse the simple issues involved, and to escape the application to them of clear and well established principles.

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